

NO. 48881-7-II

---

**COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON**

---

SERVICE EMPLOYEES INTERNATIONAL UNION 775 NW,

Appellant,

v.

DEPARTMENT OF SOCIAL AND HEALTH SERVICES, AND  
FREEDOM FOUNDATION,

Respondents.

---

**RESPONSE TO APPELLANT'S OPENING BRIEF**

---

ROBERT W. FERGUSON  
Attorney General

MARGARET C. McLEAN  
Assistant Attorney General  
WSBA No. 27558

ALBERT WANG  
Assistant Attorney General  
WSBA No. 45557

Labor & Personnel Division  
7141 Cleanwater Drive SW  
P.O. Box 40145  
Olympia, WA 98504-0145  
(360) 664-1467

## TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	STATEMENT OF THE CASE .....	2
III.	ARGUMENT .....	3
	A. Standard of Review.....	3
	B. Respondent DSHS is Unable to Conclude from the Four Corners of the Public Records Request Either That a PRA Exemption or Prohibition Applies or That the PECBA Prohibits Disclosure of the Responsive Records .....	5
IV.	CONCLUSION .....	7

## TABLE OF AUTHORITIES

### Cases

<i>Ameriquest Mortg. Co. v. Office of Atty. Gen.</i> , 177 Wn.2d 467, 300 P.3d 799 (2013).....	3
<i>Bainbridge Island Police Guild v. City of Puyallup</i> , 172 Wn.2d 398, 259 P.3d 190, 194 (2011).....	4
<i>Doe v. Washington State Patrol</i> , 185 Wn.2d 363, 374 P.3d 63 (2016).....	6
<i>E.g., Hangartner v. City of Seattle</i> , 151 Wn.2d 439, 90 P.3d 26 (2004).....	6
<i>Federal Way Family Physicians v. Tacoma Stands Up for Life</i> , 106 Wn.2d 261, 721 P.2d 946, 948 (1986).....	4
<i>King Cty. v. Sheehan</i> , 114 Wn. App. 325, 57 P.3d 307 (2002).....	5, 6
<i>King v. Riveland</i> , 125 Wn.2d 500, 886 P.2d 160, 169 (1994).....	3
<i>Koenig v. City of Des Moines</i> , 158 Wn.2d 173, 142 P.3d 162 (2006) .....	5
<i>Kucera v. State Dep't of Transp.</i> , 140 Wn.2d 200, 995 P.2d 63, 68 (2000).....	3, 4
<i>Predisik v. Spokane Sch. Dist. No. 81</i> , 182 Wn.2d 896, 346 P.3d 737 (2015) .....	5
<i>Progressive Animal Welfare Soc'y (PAWS) v. Univ. of Wash.</i> , 125 Wn.2d 243, 888 P.2d 592 (1994) .....	5
<i>Robbins, Geller, Rudman &amp; Dowd, LLP v. State</i> , 179 Wn. App. 711, 328 P.3d 905, 910 (2014).....	5

<i>SEIU Healthcare 775 NW v. State, Dep’t of Soc. &amp; Health Servs.</i> , 193 Wn. App. 377, 2016 WL 1447304 (2016).....	5, 7
<i>Tyler Pipe Indus., Inc. v. State Dep’t of Rev.</i> , 96 Wn.2d 785, 638 P.2d 1213, 1217 (1982).....	4
<i>Wade’s Eastside Gun Shop v. Dep’t of Labor &amp; Indus.</i> , 185 Wn.2d 270, 372 P.3d 97 (2016).....	7
<i>Yakima v. Yakima Herald-Republic</i> , 170 Wn.2d 775, 246 P.3d 768 (2011) .....	6

### **Statutes**

RCW 41.56 .....	1, 6
RCW 42.56.030 .....	5
RCW 42.56.070 .....	5
RCW 42.56.080 .....	5
RCW 42.56.540 .....	4
RCW 42.56.550(3).....	3

## **I. INTRODUCTION**

The Freedom Foundation submitted a public records request to the Department of Social and Health Services asking for the times and locations of individual providers' contracting appointments and initial training presentations for individual providers. It appears the Freedom Foundation could use this information to contact individual providers and discourage them from joining the union or paying union fees. The individual providers' bargaining representative, Service Employees International Union Healthcare 775NW (SEIU 775), sought an injunction preventing release of responsive records.

This appeal concerns whether the Washington Public Employment Collective Bargaining Act (PECBA), Chapter 41.56 RCW, acts as an "other statute" exemption that prevents release of these records for purposes of the Public Records Act (PRA). Use of the requested records by a state agency to undermine union activity would constitute an unfair labor practice pursuant to the PECBA and would be prohibited.

As a result, the Department, cognizant of the broad mandate for public disclosure of records and the severe penalties for failure to disclose, determined that disclosure of the requested records was required and no exemption applied. Nothing has convinced the Department that this initial

determination was incorrect. The Department stands ready to produce the records when directed or permitted to do so by this court.

## **II. STATEMENT OF THE CASE**

On January 12, 2016, the Department received a public records request from the Freedom Foundation for information regarding Individual Providers (IPs) and their bargaining representative, SEIU 775. Clerk's Papers at 95. In relevant part, the request sought, "[t]he times and locations of all contracting appointments for individual providers held or to be held between November 1, 2015 and December 31, 2015," and, "[t]he times and locations of any state-sponsored or facilitated opportunities for individual providers to view the initial safety and orientation training videos . . . held or to be held between November 1, 2015 and December 31, 2016." *Id.* The Department determined that it had records responsive to the request and that the records were not exempt from release. CP at 94, 215-17.

The Department notified SEIU 775 of its intent to release responsive records that pertain to it and its members and provided the union an opportunity to seek an injunction enjoining the release of the records. CP at 94. SEIU 775 asserted that the requested records are exempt from release pursuant to the PRA "other statutes" exemption and filed a motion in Thurston County Superior Court for a preliminary and

permanent injunction prohibiting their release. CP at 26-41. The trial court denied the motion for preliminary and permanent injunctive relief and SEIU 775 timely appealed. CP at 386-88, 390-91. On April 7, 2016, the Court of Appeals issued a stay preventing the release of the requested documents pending the appeal. The Department stands ready to release the records if the stay is lifted.

### **III. ARGUMENT**

#### **A. Standard of Review**

Judicial review of agency action under the PRA, including application of an exemption, is de novo. RCW 42.56.550(3). The burden of proof is on the party seeking to prevent disclosure to show that an exemption applies. *Ameriquest Mortg. Co. v. Office of Atty. Gen.*, 177 Wn.2d 467, 486, 300 P.3d 799 (2013). In this case, that burden falls on SEIU 775.

In general, a trial court's decision whether to grant an injunction is reviewed for abuse of discretion. *Kucera v. State Dep't of Transp.*, 140 Wn.2d 200, 209, 995 P.2d 63, 68 (2000). The trial court's decision exercising that discretion will be upheld unless it is based upon untenable grounds, is manifestly unreasonable, or is arbitrary. *King v. Riveland*, 125 Wn.2d 500, 515, 886 P.2d 160, 169 (1994). To obtain injunctive relief—preliminary or permanent—SEIU 775 must establish the same three basic

requirements: (1) it has a clear legal or equitable right; (2) it has a well-grounded fear of immediate invasion of that right by the entity against which it seeks the injunction; and (3) the acts about which it complains are either resulting or will result in actual and substantial injury. *Kucera*, 140 Wn.2d at 200. If SEIU 775 fails to satisfy any one of these three requirements, the injunction generally should be denied. *Federal Way Family Physicians v. Tacoma Stands Up for Life*, 106 Wn.2d 261, 265, 721 P.2d 946, 948 (1986). At the preliminary injunction hearing, the moving party need only establish the *likelihood* that it will ultimately prevail on the merits—not the ultimate right to a permanent injunction. *Tyler Pipe Indus., Inc. v. State Dep’t of Rev.*, 96 Wn.2d 785, 793, 638 P.2d 1213, 1217 (1982).

Overlaying that general standard for an injunction is the standard in RCW 42.56.540, which specifically governs the court’s power to enjoin production of a record under the PRA. *Bainbridge Island Police Guild v. City of Puyallup*, 172 Wn.2d 398, 407 n.2, 259 P.3d 190, 194 (2011). “Under RCW 42.56.540, a court may enjoin production of requested records if an exemption applies and examination would clearly not be in the public interest and would substantially and irreparably damage any person, or would substantially and irreparably damage vital governmental



functions.” *Robbins, Geller, Rudman & Dowd, LLP v. State*, 179 Wn. App. 711, 719, 328 P.3d 905, 910 (2014).

**B. Respondent DSHS is Unable to Conclude from the Four Corners of the Public Records Request Either That a PRA Exemption or Prohibition Applies or That the PECBA Prohibits Disclosure of the Responsive Records**

RCW 42.56.070 requires the Department to disclose public records “unless the record falls within the specific exemptions of . . . the chapter, or other statute which exempts or prohibits disclosure of specific information or records.” *Progressive Animal Welfare Soc’y (PAWS) v. Univ. of Wash.*, 125 Wn.2d 243, 250, 888 P.2d 592 (1994). The PRA must be liberally construed and its exemptions narrowly construed. RCW 42.56.030. RCW 42.56.080 also prohibits an agency from distinguishing among requestors and from requiring the requestor to disclose the purpose for the request, except to establish if it is for a commercial purpose or if an inquiry is specifically allowed by statute. *King Cty. v. Sheehan*, 114 Wn. App. 325, 326, 57 P.3d 307 (2002); *SEIU Healthcare 775 NW v. State, Dep’t of Soc. & Health Servs.*, 193 Wn. App. 377, ¶¶ 66-68, 2016 WL 1447304 (2016). When determining whether an exemption applies, the agency must look to information within the four corners of the record. *Predisik v. Spokane Sch. Dist. No. 81*, 182 Wn.2d 896, 906, 346 P.3d 737 (2015); *Koenig v. City of Des Moines*, 158 Wn.2d 173, 187, 142 P.3d 162 (2006); *King Cty. v.*

*Sheehan*, 114 Wn. App. 325, 341, 57 P.3d 307 (2002). Where a specific exemption in the PRA applies, the court must also find that such disclosure would clearly not be in the public interest and would substantially and irreparably damage any person or a vital governmental function in order to enjoin release under RCW 42.56.540. *Yakima v. Yakima Herald-Republic*, 170 Wn.2d 775, 807-08, 246 P.3d 768 (2011).

While it is possible for a statutory scheme to establish an exemption even though it does not use the word “confidential” or expressly refer to the PRA, an “other statute” must clearly prohibit the release of records. *E.g., Hangartner v. City of Seattle*, 151 Wn.2d 439, 453, 90 P.3d 26 (2004) (attorney-client privilege statute constitutes an “other statute” exemption to the PRA); *see also Doe v. Washington State Patrol*, 185 Wn.2d 363, ¶35 and n.5, 374 P.3d 63 (2016).

In the present case, the records in dispute are responsive to the Freedom Foundation’s request and the Department cannot conclude from the four corners of the request that the records fall within a specific exemption that exempts or prohibits disclosure, either under the PRA or under the PECBA (RCW 41.56). SEIU 775 presents a novel theory that if the Department were to do what the Freedom Foundation plans to do, that would be an unfair labor practice under PECBA, and as a result, the Department’s disclosure of records to the Freedom Foundation here would

also constitute an unfair labor practice, thereby violating PECBA. This is a theory heretofore not addressed by any court of record.

If the Department accepted SEIU's novel theory and withheld the records, and that withholding was determined to be improper, the Department would be liable for potentially substantial penalties. *See Wade's Eastside Gun Shop v. Dep't of Labor & Indus.*, 185 Wn.2d 270, 372 P.3d 97 (2016) (permitting a penalty for improperly withheld records on a per page basis). Accordingly, the Department resolved the uncertainty in favor of disclosure, as the policy of the PRA requires it to do. *See SEIU 775 v. DSHS*, 2016 WL 1447304, at \*10. The Department stands ready to release the records in the absence of a court order preventing their release and asks the Court to provide it with clear direction as to its duties under the PRA.

#### **IV. CONCLUSION**

The Department requests direction from the Court related to the

///


///

specific request at issue in this case and the Department's duties under the PRA.

RESPECTFULLY SUBMITTED this 10 day of September,  
2016.

ROBERT W. FERGUSON  
Attorney General

  
MARGARET C. McLEAN  
Assistant Attorney General  
WSBA No. 27558

  
ALBERT WANG  
Assistant Attorney General  
WSBA No. 45557

Labor & Personnel Division  
7141 Cleanwater Drive SW  
P.O. Box 40145  
Olympia, WA 98504-0145  
(360) 664-1467

NO. 48881-7-II

**COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON**

SEIU HEALTHCARE 775NW,

Appellant,

v.

STATE OF WASHINGTON  
DEPARTMENT OF SOCIAL AND  
HEALTH SERVICES and FREEDOM  
FOUNDATION,

Defendants.

CERTIFICATE OF  
SERVICE

I certify that I served a copy of the Respondent, DSHS' Response to Appellant's Opening Brief and this Certificate of Service on all parties or their counsel of record on September 6, 2016 as follows:

XX Via electronic service

TO: Dmitri Iglitzin, [iglitzin@workerlaw.com](mailto:iglitzin@workerlaw.com)  
Jennifer Robbins, [robbins@workerlaw.com](mailto:robbins@workerlaw.com)  
Laura Ewan, [ewan@workerlaw.com](mailto:ewan@workerlaw.com)  
Schwerin Campbell Barnard Iglitzin & Lavitt  
Counsel for Plaintiff

James Abernathy,  
[jabernathy@myfreedomfoundation.com](mailto:jabernathy@myfreedomfoundation.com)  
Stephanie Olson,  
[solson@myfreedomfoundation.com](mailto:solson@myfreedomfoundation.com)  
David Dewhirst,  
[ddewhirst@myfreedomfoundation.com](mailto:ddewhirst@myfreedomfoundation.com)  
Counsel for Freedom Foundation

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 6<sup>th</sup> day of September, 2016 at Olympia, WA.

  
\_\_\_\_\_  
LORI SANDLIN

# WASHINGTON STATE ATTORNEY GENERAL

**September 06, 2016 - 2:35 PM**

## Transmittal Letter

Document Uploaded: 2-488817-Response Brief.pdf

Case Name: SEIU 775 v. DSHS, Freedom Foundation

Court of Appeals Case Number: 48881-7

**Is this a Personal Restraint Petition?** Yes ☐ No ☒

### The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: \_\_\_\_\_

Answer/Reply to Motion: \_\_\_\_\_

☒ Brief: Response

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: \_\_\_\_\_

Hearing Date(s): \_\_\_\_\_

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: \_\_\_\_\_

### Comments:

No Comments were entered.

Sender Name: Lori Y Sandlin - Email: [loris2@atg.wa.gov](mailto:loris2@atg.wa.gov)